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No. 941

In the Supreme Court of the United States

OCTOBER TERM, 1958

THE HONORABLE J. SAM PERRY, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, PETITIONER

v.

ROSS M. MADDEN, REGIONAL DIRECTOR FOR THE THIRTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court below, officially reported at 264 F. 2d 169, is set forth at pp. 26-36 of the petition. The original and supplemental findings of the district court in the proceeding giving rise to the instant one are set forth at pp. 17 and 24 of the petition, and the opinion of the Court of Appeals in that proceeding is reported at 259 F. 2d 297 and set forth at pp. 20-23 of the petition.

JURISDICTION

The judgment of the court below was entered on February 27, 1959. The petition for a writ of certiorari was filed on May 22, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The district court dismissed a suit for an injunction under Section 10(l) of the National Labor Relations Act on procedural grounds, and an appeal was taken by the Board's Regional Director to the Court of Appeals. Thereafter, the Regional Director discovered that the proceeding did not comply with all of the investigative steps prescribed in the Board's Statements of Procedure and requested that the appeal be dismissed, but at the same time reserved the right to institute a new proceeding should the allegedly illegal activity continue and new charges be filed. The Court of Appeals dismissed the appeal "with prejudice," on the ground that "the Board failed to comply with its own procedures." The respondent unions thereupon returned to the district court and obtained supplemental findings adverse to the Board on the substantive issues in the case.

The question presented is whether, in these circumstances, the Court of Appeals—concluding that this action by the district court was inconsistent with its intention in disposing of the appeal, namely, to terminate the case on the procedural ground alone and not affect the Board's right to maintain new Section 10(l) proceedings based on new charges of illegal

activity by the unions—may properly issue a writ of mandamus to the district court requiring that it vacate the supplemental findings.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, pp. 17-20, *infra*.

STATEMENT

A. *The events giving rise to the instant proceeding.*

On August 15, 1958, respondent Regional Director filed a petition in the District Court for the Northern District of Illinois under Section 10(l) of the National Labor Relations Act, alleging that there was reasonable cause to believe that the International Organization of Masters, Mates and Pilots, its Locals 28 and 3, and Rutan, their agent, were engaging in activities violative of the Act's secondary boycott provision, Section 8(b)(4)(A).[1] The petition requested that an injunction be issued, enjoining such activities pending a final determination of the unfair labor practice charges by the Board.

The unions moved to dismiss the proceeding on the grounds that the International had no part in the activity complained of; Local 28 was composed entirely of supervisory employees and thus was not a

[1] The relevant facts are undisputed, and are set forth in the pleadings in the court below, which are included in the record filed with this Court.

"labor organization" within the meaning of the Act;[2] Local 28 had not acted in concert with Local 3 (which concededly is a labor organization); and, in any event, the conduct of the unions was not unlawful but legitimate primary activity. The unions also contended that the proceeding should be dismissed because an adequate preliminary investigation of the charges had not occurred prior to the institution of the suit.

The matter came on for hearing before petitioner, Judge Perry, who deferred ruling on the motions to dismiss until after the Regional Director had put on his evidence. At the conclusion of the Regional Director's case, the unions called him, pursuant to subpena, for the purpose of testifying and adducing evidence on the nature and extent of the preliminary investigation conducted by his office of the charges which formed the basis for the injunction petition. The Regional Director declined to testify or produce the evidence, pursuant to the agency's position that the adequacy of the preliminary investigation of the charge, and whether such investigation complies with Section 101.4 of the Board's Statements of Procedure,[3]

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[2] Section 8(b)(4)(A) only proscribes action by a "labor organization or its agents." Section 2(5) defines "labor organization" as an organization in which "employees participate," and the definition of "employee" (Section 2(3)) excludes supervisors.

[3] In relevant part, Section 101.4, as it was in effect during the events herein, provided as follows:

> Sec. 101.4 *Investigation of charges*— * * * The regional director requests the person filing the charge to submit evidence in its support. The person against whom the charge is filed * * * is asked to submit a

are matters solely for administrative determination and are not litigable in a Section 10(l) proceeding. The unions thereupon renewed their motion to dismiss the petition on the ground of the failure to establish an adequate preliminary investigation. Judge Perry granted the motion, entering findings on August 26, 1958 (Pet. 17-19), which draw a distinction between the International and the other unions. The proceeding was dismissed as to the former on the ground that no "evidence has been produced connecting respondent MMP with the events complained of in the petition." It was dismissed as to the remaining respondents on the ground that an adequate preliminary investigation is a "jurisdictional requirement" for the maintenance of a Section 10(l) proceeding, and that the Regional Director's refusal to testify and produce evidence on this question deprived respondents of the opportunity to establish a relevant defense.

The Regional Director appealed the dismissal as to the latter respondents to the court below. Before the appeal was heard, however, it came to the attention of the General Counsel of the Board, who is ultimately responsible for the conduct of Section 10(l) proceedings, that the preliminary investigation had in fact failed to comply with the Board's Statements of Procedure in certain respects. He so notified the court

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written statement of his position in respect to the allegations. The case is then assigned to a member of the field staff for investigation, who interviews representatives of all parties and those persons who have knowledge as to the charges * * * [29 C.F.R. 101.4.]

below and requested that the appeal be dismissed. At the same time, he specifically asserted that, in his opinion, such action would not "preclude the institution of a fresh Section 10(l) proceeding if new charges are filed alleging that the unions have resumed picketing which is proscribed by Section 8(b)(4) of the Act." On October 2, 1958, the court dismissed the appeal with prejudice "because [the court] finds the Board failed to comply with its own procedures" (Pet. 23, 259 F. 2d 297, 299).

The unions then returned to Judge Perry in the district court, and requested that he enter supplemental findings, predicating the dismissal as to the respondents other than the International, not only on the investigation ground originally selected, but also on the merits. The reason for the request was stated to be to "make it perfectly clear that petitioner [the Regional Director] may not relitigate the controversy which petitioner has already litigated in this case." On October 7, 1958, Judge Perry, over the objection of the Regional Director, granted the unions' request. He entered supplemental findings to the effect that: (1) Local 28 was not a labor organization within the meaning of the Act; (2) Local 28's activity was carried on in support of its own dispute with the primary employer and not on behalf of Local 3; (3) there was no reasonable cause to believe that Local 3 would resume picketing; and (4) all of the picketing in the case was in any event primary activity which is not proscribed by the Act. (R. 24-25.)

B. *The instant proceeding*

On or about November 25, 1958, the Regional Director instituted the instant mandamus proceedings in the court below for the purpose of vacating the supplemental findings. The petition asserted that, in making the supplemental findings, Judge Perry had acted without legal authority and in a manner inconsistent with the Court of Appeals' dismissal of the prior appeal. Following such dismissal, the case no longer remained alive or vital in any respect, but was in the posture of having been finally dismissed on the procedural ground assigned in the original dismissal order. Accordingly, there was no further case or controversy with respect to which Judge Perry could have acted. The petition further asserted that, unless such findings were vacated, there was imminent danger that they would serve as an obstacle to the maintenance of a new Section 10(l) proceeding based on new charges which, in the meantime, had been filed against the unions.[4]

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[4] In November 1958, three new charges were filed with the Board's Regional Offices in Chicago, St. Louis, and Minneapolis, alleging that, subsequent to the prior proceeding, the unions had engaged in further acts of illegal picketing, which implicated additional neutral employers and occurred at places different from those involved in the prior proceeding. These charges were consolidated in the St. Louis region, where the principal office of Local 28 was located. On December 11, 1958, after investigation disclosed reasonable cause to believe that they were true, the Regional Director for the St. Louis region petitioned the District Court for the Eastern District of Missouri for injunctive relief pursuant to Section 10(l). On January 8, 1959, the District Court dismissed the petition on the ground that it

On February 27, 1959, the court below handed down its decision. The court agreed that Judge Perry lacked power, after the appeal from his original order had been dismissed, to enter supplemental findings on the merits. As stated by the court (Pet. 32):

> So far as it affected the Locals, Judge Perry's order of August 26, 1958 was a final order when he entered it. It remained a final order when we dismissed the Regional Director's appeal therefrom. The order was expressly based on the reasons recited therein. In substance, Judge Perry held that for the reasons stated the Regional Director *had no right to maintain* the action. Inasmuch as Judge Perry dismissed the case on these grounds, he had no occasion to rule on the merits of the cause of action, and he did not then do so. If we had reversed his order, he would have been required to pass on the merits in due course. But we dismissed the appeal without reversing and this left no case pending before Judge Perry and hence his entries of findings and conclusions thereafter were not germane to any action in his court. Their entry was error.

In short, the court below in effect held that, when it dismissed the appeal from Judge Perry's original order "with prejudice," "because [the court] finds the Board failed to comply with its own procedures"

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involved the same cause of action as the Illinois proceeding, the latter had been dismissed on the merits, and it was thus *res judicata* of the issues presented in the Missouri proceeding, *Cosentino* v. *Local 23*, 43 LRRM 2385 (Pet. 37-40). An appeal from this decision is presently pending before the Court of Appeals for the Eighth Circuit.

(p. 6, *supra*), it intended to terminate the case on the procedural ground first selected by Judge Perry, and that his subsequent action in attempting to add substantive grounds was inconsistent with the appellate mandate in the case and thus beyond his powers. In these circumstances, it followed, as the court added (Pet. 33-36), that nothing in Rules 41(b), 52(b), or 60(b) of the Federal Rules of Civil Procedure could confer such power on Judge Perry.

Moreover, the court below concluded that the continued existence of the supplemental findings interposed a threat to future Section 10(l) proceedings against the unions, which, in disposing of the earlier appeal, it had intended to leave unaffected (Pet. 36). The court noted that these findings had already been relied on before the District Court in Missouri (see n. 4, *supra*), which had dismissed a new Section 10(l) proceeding against the unions on the ground that it involved the same cause of action as that in the Illinois proceeding (*ibid.*).

For these reasons, and finding that no appeal could have been taken from the entry of the supplemental findings, the court below ordered that a writ of mandamus issue directing Judge Perry to vacate those findings (*ibid.*).

ARGUMENT

The facts recited in the Statement reveal that this case presents a situation which "is so unique that it is without precedent and is likely to be without progeny" (*Western Pacific Railroad Case*, 345 U.S. 247, 275, Jackson, J., dissenting). The problem arises

because of the unusual circumstance that the unions, having elected to stand on a procedural ground, were not satisfied when that ground was adopted by the district court and in effect sustained by the Court of Appeals. They returned to the district court, after the appeal had been disposed of, and persuaded the district court to predicate its action on substantive grounds as well. Moreover, the holding of the Court of Appeals that the district court lacked power to take this action is of no general importance, for it turns essentially on what the Court of Appeals intended, respecting the future course of this particular case and its impact on new proceedings, when it disposed of the appeal from the original dismissal order. For these reasons alone, the petition does not present an issue warranting certiorari; nor do the considerations advanced by petitioner require a contrary conclusion.

1. Petitioner errs in reading (Pet. 9) the decision of the court below as a flat holding that "the post-decree powers of a district court terminate when it enters an order of dismissal without reaching the ultimate substantive issues in the litigation." The holding of the court must be viewed in the light of the circumstance that, between the time of Judge Perry's original order and his entry of supplemental findings, an appeal was taken and the appellate court approved termination of the case on the procedural ground originally selected by the district court. Thus, although the court's action took the form of a dismissal of the appeal, it is clear from a reading of the court's opinion that it was in fact passing on the

issues in the appeal.[5] After reciting the events which had occurred, the court concluded that: "Plainly speaking the Director was not entitled at any time to equitable relief under the Act." It accordingly dismissed the appeal because "the Board failed to comply with its own procedures and not because counsel decided to take the case out of our hands." And, to insure that no further steps would be taken in the case, the court specified that the appeal was "dismissed with prejudice." (Pet. 23.)

In these circumstances, contrary to petitioner's assumption (Pet. 11), this case cannot be treated "in the same posture as if no appeal had ever been taken from Judge Perry's order." Even if Rules 52(b) and 60(b) would have empowered Judge Perry to amend his original order of dismissal had no appeal been taken, they can be of no help where, as here, there has been an intervening appeal and an appellate decision on the issues in the case.[6] For then the appellate mandate controls the case, and the district court's addition of supplemental findings would be inconsistent with the basis on which the appellate

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[5] This distinguishes the instant case from the authorities cited by petitioner (Pet. 10), which deal with the usual situation where the appeal is dismissed for such extrinsic reasons as untimeliness or want of prosecution. In that situation, the dismissal, of course, leaves the lower court free to proceed just as if no appeal had been taken, for the appellate court has not spoken respecting the issues in the case.

[6] *Boaz* v. *Mutual Life Ins. Co. of New York*, 146 F. 2d 321 (C.A. 8) is thus distinguishable, for, as petitioner himself recognizes (Pet. 10), it deals with the post-decree powers of the district court where there has been no intervening appeal.

court desired the case to be disposed. Clearly, nothing in Rules 52(b) and 60(b) empowers the district court to override the appellate court's judgment in the case.

Moreover, wholly apart from the effect of the intervening appeal, these rules did not confer power on Judge Perry to enter the supplemental findings in question. Rule 52(b) requires that a motion to amend findings be made within 10 days after entry of judgment, and the motion here occurred after that time. Nor does the fact that an appeal intervened toll this period, as petitioner suggests (Pet. 11), for in the case of an appeal there is available the settled procedure of requesting the appellate court, within the 10-day period, to remand the case to the district court for additional findings.[7] Rule 60(b) empowers a district court to "relieve a party * * * from a final judgment" for specified reasons, including "mistake," "inadvertence," "fraud," or "any other reason justifying relief from the operation of the judgment." The grounds covered by the supplemental findings were urged during the trial and both the unions and Judge Perry deliberately declined to predicate the original order of dismissal thereon (p. 5, *supra*). Hence, the subsequent entry of such findings was merely a belated attempt to reinforce the decision with grounds which were available from the begin-

[7] See *Fiske* v. *Wallace*, 115 F. 2d 1003, 1004 (C.A. 8), certiorari denied, 314 U.S. 663; *Isgrig* v. *United States*, 109 F. 2d 131, 134 (C.A. 4); Rule 6(b)(2), Federal Rules of Civil Procedure; cf. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 218.

ning but consciously passed over. No part of Rule 60(b) was meant to encompass such a situation. See *Ackermann* v. *United States*, 340 U.S. 193, 198.

2. The interpretation given by the court below to Rule 41(b), which petitioner challenges (Pet. 12-16), was not necessary to its decision, and in any event the interpretation was proper in the circumstances of this case. Thus, noting that the district court in Missouri (n. 4, *supra*) had dismissed a subsequent Section 10(l) proceeding against the unions on the ground that, under Rule 41(b), Judge Perry's original order, without regard to the supplemental findings, operated as a dismissal on the merits and thus as *res judicata* of the issues presented in Missouri, the court below indicated that this was not its view of the effect of Judge Perry's original order (Pet. 33-34). Analyzing the reasons given by Judge Perry in his original dismissal order, the court below concluded that he had originally dismissed the proceeding (as to all of the unions except the International), not for failure to obey an order of the court as the Missouri district court had held, but for "failure of a jurisdictional requirement, which is expressly excepted from the operation of rule 41(b)" (Pet. 34).

Whether the court was right or wrong in this respect—and we submit that it was right—has no bearing on the propriety of its action in striking the supplemental findings. For, even if Judge Perry's original dismissal were assumed to be a dismissal for failure of the Regional Director to testify as ordered by the court and, under Rule 41(b), this operated "as an adjudication upon the merits," the appeal, as

we have shown, ended the case on this particular ground. Judge Perry was consequently still not free to increase the prejudice of his original dismissal—which only would have extended to further suits on the same cause of action—by adding substantive findings which, under the doctrine of collateral estoppel, would have reached new causes of action as well.

Nor is a basis for certiorari provided by the possibility that the Eighth Circuit, which has the Missouri case before it on appeal, may disagree with the court below as to the interpretation of Judge Perry's original dismissal order (Pet. 12). The grounds on which the Eighth Circuit will decide the case before it are entirely speculative at this time. That court may, as petitioner assumes, disagree with the court below, but it is equally possible that it may either adopt the interpretation of the court below or place its decision on grounds which do not depend on that interpretation at all.[8] Moreover, if there be any error in the Eighth Circuit's ultimate decision, the opportunity exists to correct it by seeking certiorari directly in that case.

In any event, the interpretation of Judge Perry's original dismissal order made by the court below was

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[8] See *Commissioner* v. *Sunnen*, 333 U.S. 591, 597; *Cromwell* v. *County of Sac*, 94 U.S. 351, 352.

[9] For example, the Board urged, *inter alia*, that the Missouri proceeding involves a *different* cause of action from that in Illinois proceeding. If the Eighth Circuit were to agree, it could reverse the district court without reaching the question of whether Judge Perry's original order was a dismissal on the merits, for that would be material only with respect to subsequent suits based on the *same* cause of action.

a permissible one. The reasons given in support of the order emphasize at two points that the conduct of an adequate preliminary investigation is a "jurisdictional requirement" to the maintenance of a Section 10(l) proceeding (Pet. 18), and, in selecting this ground for dismissal, Judge Perry deliberately passed over the unions' other grounds which clearly involved the merits. In these circumstances, the court below could well conclude, as it did, that, at the time he entered the order, Judge Perry believed that he was dismissing the proceeding on jurisdictional grounds. Whether Judge Perry was correct in his view that the conduct of an adequate preliminary investigation is jurisdictional is immaterial, for it is his intention which determines the effect which he desired to give to his dismissal action; if he intended to dismiss on jurisdictional grounds and not on the merits, this intention cannot be altered by the fact that the grounds assigned are really not jurisdictional.

3. Contrary to petitioner's contention (Pet. 16), mandamus was the proper remedy here. It is well settled that such remedy is the appropriate manner of requiring compliance with an appellate mandate, irrespective of whether the issues involved in the question of compliance might also be presented by way of appeal.[10] Moreover, in view of the fact that the supplemental findings did not constitute a new order and were entered after the appeal from the original order of dismissal was dismissed with prejudice, no

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[10] *Ex parte Union Steamboat Co.*, 178 U.S. 317, 319; *In re Sanford Fork & Tool Co.*, 160 U.S. 247; cf. *United States* v. *Smith*, 331 U.S. 469.

appeal from those findings was possible. *Larsen* v. *Nordbye*, 181 F. 2d 765 (C.A. 8), relied on by petitioner (Pet. 16), is distinguishable for there, unlike here, the district court action was not controlled by a prior appellate mandate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June, 1959.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 2. When used in this Act—

* * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * *

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concern-

ing grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * * *

Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *

* * * *

Sec. 10. (l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true

and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the United States District Court for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute serv-

ice upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D).

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